Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Person to Contact:

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Date:
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Legend

Taxpayer =

Country X =

U.S. Holding Co =

State W =

P1 =

P =

Country Y =

State V =

x =

Private Act =

Legal Counsel =

Dear :

This is in response to your authorized representative's submission dated April 19, 2002, and subsequent submissions, requesting a ruling on the meaning of the term "State law or regulation" under § 817(d)(1) of the Internal Revenue Code.

FACTS

Taxpayer is a corporation organized under the laws of Country X. Taxpayer's principal office is located in Country X. Taxpayer represents that it anticipates filing its initial Unites States income tax return for the year ended December 31, 2001.

Taxpayer is wholly owned by U.S. Holding Co., a corporation organized under the laws of State W. U.S. Holding Co. is wholly owned by P1, a corporation organized under the laws of Country Y. P1 is wholly owned by P, a publicly traded holding company organized under the laws of Country Y.

Taxpayer maintains a permanent office in the United States located in State V. Taxpayer represents that at all times it will maintain assets in the United States with a tax basis equal to at least ten percent of the previous year's gross receipts, up to $x.

Taxpayer is subject to a Private Act enacted by the Country X legislature. Under Country X law, a private act is defined as an act that, not being a government measure, affects or benefits some particular person or corporate body. The Private Act modifies Country X law relating to Taxpayer.

Taxpayer issues annuity and life insurance products with respect to which the cash surrender value and death benefit varies with the investment performance of the underlying pools of assets held in separate accounts. The premiums, less any applicable policy charges, are allocated to separate accounts established by Taxpayer pursuant to authority granted under Private Act. A provision of the Private Act prevents Taxpayer from using the assets in the separate accounts in its general account. Taxpayer's Legal Counsel in Country X has issued an opinion that assets credited to a separate account of Taxpayer are not available to pay the amounts due to creditors whose claims do not relate to that separate account. Taxpayer's annuity and life insurance contracts are designed to comply with the applicable provisions of U.S. tax law: §§ 72, 817(h), 7702, and 7702A. Taxpayer represents that it only issues contracts to United States persons.

Taxpayer has filed an election to be treated as a domestic corporation for all purposes of the Internal Revenue Code, in accordance with § 953(d). Taxpayer's election statement was filed in accordance with Notice 89-79, 1989-2 C.B. 392. Taxpayer intends to qualify as a life insurance company as defined in § 816 and be

subject to tax under § 801.

REQUESTED RULING

For purposes of § 817(d)(1) of the Code, the accounts to which Taxpayer allocates all or part of the amounts received under annuity and life insurance contracts issued by Taxpayer and, which pursuant to Private Act, are segregated from the general asset accounts of Taxpayer, will be treated as accounts that are segregated from the general asset accounts of Taxpayer, "pursuant to State law or regulation."

LAW AND ANALYSIS

Section 817(h)(1) of the Code provides that, for purposes of subchapter L, § 72 (relating to annuities), and § 7702(a) (relating to the definition of life insurance contract), a variable contract (other than a pension plan contract) which is otherwise described in § 817 and which is based on a segregated asset account shall not be treated as an annuity, endowment, or life insurance contract for any period (and any subsequent period) for which the investments made by such account are not, in accordance with regulations prescribed by the Secretary, adequately diversified.

Section 817(d) defines the term "variable contract," for purposes of part 1 of subchapter L, as a contract that: (1) "… provides for the allocation of all or part of the amounts received under the contract to an account which, pursuant to State law or regulation, is segregated from the general asset accounts of the company," (2) provides for the payment of annuities, is a life insurance contract, or provides for funding of insurance on retired lives as described in § 807(c)(6), and (3) in the case of an annuity contract, the amounts paid in, or the amount paid out, reflect the investment return and the market value of the segregated asset account, in the case of a life insurance contract, the amount of the death benefit (or the period of coverage) is adjusted on the basis of the investment return and the market value of the segregated asset account, or in the case of funds held under a contract described in § 817(d)(2)(C), the amounts paid in, or the amounts paid out, reflect the investment return and the market value of the segregated asset account.

Section 817(c) provides that, for purposes of part I of subchapter L (other than § 809), a life insurance company which issues variable contracts shall separately account for the various income, exclusion, deduction, asset, reserve, and other liability items attributable to such variable contracts.

Section 817(a) provides that with respect to variable contracts, increases and decreases in § 807(c) reserves attributable to the appreciation and depreciation in the value of the assets in the segregated asset account are disregarded for purposes of § 807(a) and (b).

Under § 817(b), the basis of each asset in a segregated asset account is increased or decreased by the amount of appreciation or depreciation, to the extent the reserves or other items referred to in § 817(a) are adjusted.

Section 7701of the Code provides:

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof – ....

> (9) United States. The term “United States” when used in a geographical sense includes only the States and the District of Columbia.
>
> (10) State. The term “State” shall be construed to include the District of Columbia, where such construction is needed to carry out provisions of this title.

Section 953(d) provides:

(1) In general. If –

> (A) a foreign corporation is a controlled foreign corporation (as defined in § 957(a) by substituting “25 percent or more” for “more than 50 percent” and by using the definition of United States shareholder under 953(c)(1)(A)),
>
> (B) such foreign corporation would qualify under part I or II of subchapter L for the taxable year if it were a domestic corporation,
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> (C) such foreign corporation meets such requirements as the Secretary shall prescribe to ensure that the taxes imposed on it by chapter 1 of the Code are paid, and
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> (D) such foreign corporation makes an election to have this paragraph apply and waives all benefits to such corporation granted by the United States under any treaty,

for purposes of this title, such corporation shall be treated as a domestic corporation.[1]

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[1]Section 953(d)(3) provides an exception to the electing corporation’s treatment as a domestic corporation. It provides that, if any corporation treated as a domestic corporation under § 953(d) is treated as a member of an affiliated group for purposes of chapter 6 (relating to consolidated returns), any loss of such corporation shall be

Section 953(e)(5) provides that for purposes of § 953 and § 954, the determination of whether a contract issued by a controlled foreign corporation or a qualified business unit (within the meaning of § 989(a)) is a life insurance contract or an annuity contract shall be made without regard to sections 72(s), 101(f), 817(h), and 7702 if—

> (A) such contract is regulated as a life insurance or annuity contract by the corporation's or unit's home country, and
>
> (B) no policyholder, insured, annuitant, or beneficiary with respect to the contract is a United States person.

The issue presented in this case is whether Taxpayer's separate account products are "variable contracts," as defined in § 817(d) of the Code. The difficulty in this case lies in § 817(d)(1) which requires a variable contract to "provide[ ] for the allocation of all or part of the amounts received under the contract to an account which, pursuant to State law or regulation, is segregated from the general assets of the company. (Emphasis added.) The term "State" is defined in § 7701(a)(9)[2] & (10), which are set forth above. The implication from these paragraphs of § 7701(a) is that the term "State" means one of the 50 states or the District of Columbia.

This implication is, however, subject to the flush language appearing at the beginning of § 7701(a): "When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof." Section 817(d)(1) does not contain a distinctly expressed meaning for "State," other than one of the 50 states or the District of Columbia. Neither does the legislative history underlying this Code provision. Thus, our task is to determine whether the § 7701(a)(10) meaning of "State" – one of the 50 states or the District of Columbia – is "manifestly incompatible with the intent of [federal tax law]" in the context of § 817(d)(1) and a foreign Taxpayer that has elected to come within the provisions of § 953(d).

In this case, Taxpayer has elected under § 953(d) to be treated for purposes of the federal tax law as a domestic corporation. The only exception to this treatment involves dual consolidated losses. See § 953(d)(3), set forth in footnote 1. However, if Taxpayer's separate account contracts are not treated as variable contracts because "State" is given a restrictive meaning, Taxpayer and its U.S. policyholders will in the

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treated as a dual consolidated loss for purposes of § 1503(d) without regard to paragraph (2)(B) thereof.

[2]Section 7701(a)(9) is actually a definition of the term "United States." Section 7701(a)(9)'s definition of "United States" helps place § 7701(a)(10)'s definition of "State" in context.

following respects be treated differently from a situation involving a domestic life insurance company.

Section 817(c) requires that a life insurance company that issues variable contracts separately account for the "various income, exclusion, deduction, asset, reserve, and other liability items properly attributable to such variable contracts." If Taxpayer's contracts are not variable contracts, even though it has separate accounts protected from Taxpayer's general creditors, the policyholders and Taxpayer will not receive separate account treatment. This would be a major difference between the treatment of a domestic life insurance company issuing a similar product and Taxpayer, a § 953(d) electing company.

This disparity of treatment is readily seen if we focus on the treatment of the reserves for Taxpayer's and a domestic company's separate account products. First, assume that Taxpayer's reserves for its separate accounts do not receive the treatment mandated by § 817(a)-(c) for variable contracts. The reserves established by Taxpayer for its annuity and life insurance contacts should qualify as life insurance reserves under § 807. Taxpayer will be allowed a deduction for increases in the reserve under §§ 805(a)(2) & 807(b) and will be required to include decreases in reserves in gross income under §§ 803(a)(3) and 807(a). The amount of the reserves will be established under § 807(d)(1) as the greater of the net surrender value of the contract or the reserve established under § 807(d)(2). Taxpayer represents that, generally, the reserve will be based on the net surrender value of the contracts reflecting the value of the underlying assets.

If the value of assets held in the separate accounts increases, the cash surrender value of the contract will increase. Taxpayer will be entitled to a deduction for the increase in the reserve. No adjustment will be made to the basis of the assets to reflect the increase in market value. When the assets are sold, Taxpayer will recognize a capital gain. Accordingly, Taxpayer will recognize a current deduction when the value of the assets increases and a future capital gain when the assets are disposed. In contrast, life insurance companies that are subject to § 817(a) would not recognize a current deduction for the increase in reserve attributable to the increase in value of the assets and, due to the basis adjustment provisions of § 817(b), would not recognize any gain on the disposition of the assets.

Conversely, if the value of assets held in the separate account decreases, the cash surrender value of the contract will decrease. If § 817(a) does not apply to Taxpayer, Taxpayer, unlike domestic life insurance companies subject to the provisions of § 817(a), will be required to include the decrease in reserves in gross income. No adjustment will be made to the basis of the assets to reflect the decrease in market value. When the assets are sold, Taxpayer will recognize a capital loss. Accordingly, Taxpayer will recognize current ordinary income when the value of the assets decreases and a future capital loss when the assets are disposed.

If Taxpayer's separate account products are not treated as variable contracts, its contracts will receive different treatment from domestic contracts under § 817(h) and the regulations thereunder prescribing diversification rules. The diversification rules under § 817(h) only apply to variable contracts (other than pension plan contracts). Thus, if Taxpayer's separate account products are not variable contracts the diversification rules would be inapplicable to them.

The Code's sanction for not meeting the diversification requirements is severe. Section 817(h)(1) provides that, for purposes of subchapter L, § 72, and § 7702(a), a variable contract that does not meet the diversification requirements shall not be treated as an annuity, endowment, or life insurance contract for any period (and any subsequent period) for which the investments made by the segregated asset account are not adequately diversified under regulations prescribed by the Secretary.

The diversification rule of § 817(h) was added to the Code in the Tax Reform Act of 1984. The Senate Finance Committee in 1 S. Prt. 98-169, 98th Cong., 2d Sess. 546 (1984), explained the purpose of new § 817(h) as follows:

> The bill adopts a provision that grants the Secretary of the Treasury regulatory authority to prescribe diversification standards for investments of segregated asset accounts underlying variable contracts. The diversification requirement is provided in order to discourage the use of tax-preferred variable annuities and variable life insurance primarily as investment vehicles. The committee believes that, by limiting a customer's ability to select specific investments underlying a variable contract, the bill will help ensure that a customer's primary motivation in purchasing the contract is more likely to be the traditional economic protections provided by annuities and life insurance.

If Taxpayer's separate account products are denied variable contract status, then, as stated above, the diversification rules of § 817(h) and the regulations thereunder will not apply to Taxpayer's separate account products. The result will be that Taxpayer's separate account products will be recognized as life, endowment, or annuity contracts without meeting the diversification rules of the Code and regulations. Further, Congress' stated purpose in enacting the diversification requirements, to discourage the use of tax-preferred variable annuities and variable life insurance primarily as investment vehicles, would be subverted.[3]

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[3] Cf. United States v. Bardina, 365 F. Supp. 459 (S.D. N.Y 1973), dealing with the six year statute of limitations, in which the court found reasons, including legislative history, not to use § 7701(a)(9)'s definition of "United States," and instead used a broader definition.

Thus, another anomaly will exist if Taxpayer's separate account products are denied variable account status. A foreign insurance company that elected to be treated as a domestic insurance company under § 953(d) would be able to issue separate account products that do not meet the diversification rules, but nevertheless qualify as life, endowment, or annuity contracts. The inside buildup on the electing foreign company's nondiversified contracts would not be subject to current taxation, while the inside buildup on nondiversified contracts issued by domestic companies would be subject to current taxation. This is a dubious result, which does not treat the electing § 953(d) company the same as a domestic company. The electing foreign company is given better treatment and their policyholders are given less protection against what Congress saw as abusive use of separate account products.

The anomalies that we have discussed with respect to reserves for separate account products and with respect to the diversification standards exist because § 953(d) was added to the Code later than § 817, which was added to the Code in 1984.[4] We conclude, in light of the anomalies whose existence we have demonstrated, the statutory scheme of § 953(d), permitting an electing foreign insurance company to be treated as a domestic insurance company for all purposes (except with respect to dual consolidated losses) is manifestly incompatible with giving "State" a restrictive meaning in § 817(d)(1), and denying variable contract status to Taxpayer's separate account products. We conclude that, in the context of an electing § 953(d) company, "State," in § 817(d)(1) should be interpreted broadly enough to include the jurisdiction exercising statutory or regulatory authority over Taxpayer's separate accounts. In this case, that is Country X.

Another provision that further supports our conclusion is § 953(e)(5), set forth above. Section 953(e) was added to the Code in 1998 by section 1005(b)(1)(B) of the Tax and Trade Relief Extension Act of 1998, Pub. L. No. 105-277. If the foreign controlled corporation's separate account products are regulated as life insurance or annuity contracts by the home country and no policyholder, insured, annuitant, or beneficiary with respect to the contract is a United States person, the reference to § 817(h) in § 953(e)(5) would appear to be surplusage if "State" in § 817(d)(1) is given a restrictive meaning.

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CONCLUSION

For purposes of § 817(d)(1) of the Code, the accounts to which Taxpayer allocates all or part of the amounts received under annuity and life insurance contracts

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[4]Section 953(d) was added to the Code by section 6135(a) of the Technical and Miscellaneous Revenue Act of 1988, effective for tax years beginning after December 31, 1987.

issued by Taxpayer and, which pursuant to Private Act, are segregated from the general asset accounts of Taxpayer, will be treated as accounts that are segregated from the general asset accounts of Taxpayer, "pursuant to State law or regulation."

CAVEATS

1. Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

2. No opinion is expressed or implied concerning any foreign insurance company that has not made an election to be treated as a domestic insurance company under § 953(d).

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this letter must be attached to any income tax return to which it is relevant.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

/S/

DONALD J. DREES, JR.
Senior Technician Reviewer, Branch 4
Office of Associate Chief Counsel
(Financial Institutions & Products)